

IN THE UNITED STATES DISTRICT COURT  
FOR THE SOUTHERN DISTRICT OF TEXAS  
CORPUS CHRISTI DIVISION

WALDO AVALOS  
Plaintiff,

V.

JO ANNE B. BARNHART,  
Defendant.

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C.A. NO. C-04-646

**ORDER**

This is a social security action filed pursuant to 42 U.S.C. § 1405. Pending is plaintiff's motion for award of attorney's fees under the Equal Access To Justice Act ("EAJA"). (D.E. 29).<sup>1</sup>

The district court filed and entered a final judgment on November 9, 2005. (D.E. 27). The Government has 60 days to appeal from the date of the entry of final judgment. Fed. R. App. P. 4(a)(1)(B). On December 12, 2005, plaintiff filed its motion seeking attorneys fees.<sup>2</sup>

EAJA establishes that "a party seeking an award of fees and other expenses shall, within thirty days of final judgment in the action, submit to the court an application for fees and other expenses which shows that the party is a prevailing party and is eligible to receive an award under this subsection, ...." 28 U.S.C. § 2412(d)(1)(B). The term "final judgment" is defined in EAJA as "a judgment that is final and not appealable, ...." 28 U.S.C. § 2412(d)(2)(G) (emphasis added); see also Briseno v. Ashcroft, 291 F.3d 377, 379 (5th Cir. 2002) (per curiam).

Plaintiff's motion is premature as the Government's time for filing any notice of appeal has not


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<sup>1</sup> In support of plaintiff's motion for fees, he also files a memorandum of law, (D.E. 30), a declaration by his attorney, (D.E. 31), a time and billing statement, (D.E. 32), and a certificate of conference, (D.E. 33).

<sup>2</sup> The motion itself is dated December 9, 2005, and there is a certificate of service indicating that it was served on the Government on December 9, 2005.

lapsed yet and thus is still appealable. Plaintiff may refile a timely motion for attorney's fees with the necessary supporting documents once the final judgment is no longer appealable. Accordingly, plaintiff's motion for attorney's fees, (D.E. 29), is DENIED without prejudice.

ORDERED this 14th day of December 2005.



BRIAN L. OWSLEY  
UNITED STATES MAGISTRATE JUDGE